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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT MORRIS,

Plaintiff,

No. 2:06-cv-2936 LKK KJN P

vs.

D. HICKISON, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner proceeding without counsel with a civil rights action pursuant to 42 U.S.C. § 1983. On October 5, 2009, plaintiff moved for summary judgment against the three remaining defendants in this action: Hickison, Fry, and Herrera. (Dkt. No. 75.) On October 9, 2009, defendants Fry and Herrera filed a motion for summary judgment. (Dkt. No 93.) After carefully reviewing the record, the court recommends that plaintiff’s motion be denied and defendants’ motion be granted.

II. Allegations

This action is proceeding on the original complaint filed December 29, 2006, as to defendants Hickison, Fry and Herrera, on plaintiff’s retaliation claims against these three

1 defendants, and on plaintiff's Eighth Amendment claim against defendant Hickison.<sup>1</sup>

2 Plaintiff's complaint contains the following allegations: Plaintiff alleges that on  
3 May 18 or 19, 2005, defendant Hickison made sexually inappropriate comments to plaintiff at his  
4 prison job. Plaintiff also alleges that defendant rubbed and touched his back. (Compl. at 5: 4-5;  
5 15.) On May 24, 2005, defendant Hickison started yelling at inmate workers to get the carts out  
6 and take them to the building. Plaintiff told defendant Hickison's supervisor that this task could  
7 not be done. Defendant Hickison allegedly told plaintiff that she would write him a chrono and  
8 give him an "A" day. She did not say that she was going to file a rules violation report against  
9 him.

10 On May 24, 2005, defendant Hickison was informed that plaintiff was going to  
11 file a staff complaint against her based on the sexual harassment. On May 25, 2005, defendant  
12 Hickison allegedly retaliated against plaintiff for his threat to file the staff complaint by  
13 dismissing him from his job and writing a false rules violation report. Plaintiff was later found  
14 not guilty of the rules violation report.

15 Plaintiff alleges that on June 20, 2005, defendants Fry and Herrera allegedly  
16 retaliated against plaintiff for pursuing his staff complaint against defendant Hickison by putting  
17 him in administrative segregation. On August 12, 2005, defendant Fry allegedly again retaliated  
18 against plaintiff by placing a negative chrono in his C-file. Plaintiff was later transferred to a  
19 different prison.

20 III. Defendants' Motion for Summary Judgment

21 Legal Standard for Summary Judgment

22 Summary judgment is appropriate when it is demonstrated that the standard set  
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24 <sup>1</sup> The claims against the other defendants named in the complaint have been dismissed.  
25 By order filed August 20, 2008, plaintiff's due process, equal protection, FEHA and Title VII  
26 claims were dismissed as to defendants Hickison, Fry and Herrera, and those defendants were  
ordered to file an answer addressing plaintiff's retaliation claims. *Id.* Defendant Hickison was  
also ordered to file an answer to plaintiff's Eighth Amendment claim. *Id.*

1 forth in Federal Rule of Civil Procedure 56(c) is met. “The judgment sought should be rendered  
2 if . . . there is no genuine issue as to any material fact, and that the movant is entitled to judgment  
3 as a matter of law.” Fed. R. Civ. P. 56(c).

4 Under summary judgment practice, the moving party  
5 always bears the initial responsibility of informing the district court  
6 of the basis for its motion, and identifying those portions of the  
7 pleadings, depositions, answers to interrogatories, and admissions  
8 on file, together with the affidavits, if any, which it believes  
9 demonstrate the absence of a genuine issue of material fact.

8 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quotations omitted). “[W]here the  
9 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary  
10 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers  
11 to interrogatories, and admissions on file.’” Id. (citing Fed. R. Civ. P. 56(c). Indeed, summary  
12 judgment should be entered, after adequate time for discovery and upon motion, against a party  
13 who fails to make a showing sufficient to establish the existence of an element essential to that  
14 party’s case, and on which that party will bear the burden of proof at trial. See id. at 322. “[A]  
15 complete failure of proof concerning an essential element of the nonmoving party’s case  
16 necessarily renders all other facts immaterial.” Id. at 323. In such a circumstance, summary  
17 judgment should be granted, “so long as whatever is before the district court demonstrates that  
18 the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied.” Id.

19 If the moving party meets its initial responsibility, the burden then shifts to the  
20 opposing party to establish that a genuine issue as to any material fact actually exists. See  
21 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to  
22 establish the existence of such a factual dispute, the opposing party may not rely upon the  
23 allegations or denials of its pleadings, but is required to tender evidence of specific facts in the  
24 form of affidavits, and/or admissible discovery material, in support of its contention that the  
25 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party  
26 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome

1 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
2 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.  
3 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
4 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
5 1436 (9th Cir. 1987), impliedly overruled in part on other grounds by Hollinger v. Titan Capital  
6 Corp., 914 F.2d 1564, 1577-78 (9th Cir. 1990).

7           In the endeavor to establish the existence of a factual dispute, the opposing party  
8 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
9 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
10 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 630. Thus, the “purpose of summary  
11 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a  
12 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
13 committee’s note on 1963 amendments).

14           In resolving a summary judgment motion, the court examines the pleadings,  
15 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
16 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
17 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
18 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.  
19 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to  
20 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen  
21 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.  
22 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply  
23 show that there is some metaphysical doubt as to the material facts . . . Where the record taken  
24 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
25 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 586 (citation omitted).

26           In this case, on April 15, 2008, the court advised plaintiff of the requirements for

1 opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Dkt. No. 13);  
2 see Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035  
3 (1999); and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

#### 4 Undisputed Facts

5 The following undisputed facts (“UDF”) are either not disputed by plaintiff, or  
6 following the court’s review of the evidence submitted, have been deemed undisputed:

7 1. Defendant Herrera (“Herrera”) held the position of Correctional Lieutenant at  
8 CSP-Solano (“CSP-SOL”) from February 2004 to June 2008. (Herrera Decl. ¶ 1; Dkt. No. 97-1  
9 at 2.)

10 2. Herrera’s work responsibilities included, but were not limited to, supervising  
11 inmates and custodial staff, and maintaining the safety and security of inmates, staff, and the  
12 institution. He was also responsible for completing California Department of Corrections and  
13 Rehabilitation (“CDCR”) paperwork, known as a CDC 114-D, Administrative Segregation Unit  
14 Placement Notice, when an inmate was placed in administrative segregation (“ad seg”). (Herrera  
15 Decl. ¶ 2; Dkt. No. 97-1 at 2.)

16 3. Herrera was and is familiar with California Code of Regulations, Title 15,  
17 § 3335, which provides the guidelines for placing an inmate in ad seg. (Herrera Decl. ¶ 3.)

18 4. When an inmate’s presence in an institution’s general inmate population  
19 presents an immediate threat to the safety of the inmate or others, endangers institution security,  
20 or jeopardizes the integrity of an investigation of an alleged serious misconduct or criminal  
21 activity, the inmate shall be immediately removed from general population and placed in ad seg.  
22 Cal. Code Regs., tit. 15, § 3335(a). (Herrera Decl. ¶ 4.)

23 5. Herrera did not promulgate § 3335. (Herrera Decl. ¶ 5; Dkt. No. 97-1 at 2.)

24 6. On June 20, 2005, Herrera was advised for the first time that plaintiff had  
25 made allegations of staff misconduct. (Herrera Decl. ¶ 7.)

26 7. Herrera then followed § 3335(a), and completed a form CDC 114-D

1 (Administrative Segregation Unit Placement Notice) for plaintiff. (Herrera Decl. ¶ 9, Ex. A; Dkt.  
2 No. 97-1 at 2.)

3 8. The June 20, 2005 CDC 114-D explained that plaintiff was being re-housed in  
4 ad seg on June 20, 2005, in order to protect the integrity of an investigation into plaintiff's  
5 allegations. (Herrera Decl. ¶ 10; Dkt. No. 97-1 at 2.)

6 9. Inmate Lancaster, who testified on plaintiff's behalf at the June 20, 2005 CDC  
7 115<sup>2</sup> hearing, was also placed in ad seg. (Dkt. No. 1 at 44.)

8 10. Plaintiff was deemed a threat to the safety and security of CSP-SOL, and he  
9 was to remain in ad seg pending an administrative review as to plaintiff's appropriate program  
10 and housing needs. (Herrera Decl. ¶ 11.)

11 11. In addition, under California Code of Regulations, Title 15, § 3272, plaintiff's  
12 custody level was increased to "Maximum," in order to facilitate the move. (Herrera Decl. ¶ 12;  
13 Dkt. No. 97-1 at 2.)

14 12. Defendant Herrera did not and does not know Defendant Hickison. (Herrera  
15 Decl. ¶ 15; Dkt. No. 97-1 at 3.)

16 13. Defendant Herrera has no knowledge about plaintiff's allegations against  
17 Defendant Hickison, other than what has been claimed in the present lawsuit. (Herrera Decl.  
18 ¶ 16.)

19 14. Defendant Herrera was not involved in, and had no control over, the CDC  
20 115 hearing on June 20, 2005. (Herrera Decl. ¶ 17; Dkt. No. 97-1 at 3.)

21 15. Defendant Herrera's initial placement of plaintiff in ad seg on June 20, 2005,  
22 concluded his involvement with plaintiff. (Herrera Decl. ¶ 18.)

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23  
24 <sup>2</sup> "CDC 115" refers to the CDC 115 form prison officials use to cite inmates with a rules  
25 violation. (See Dkt. 1 at 23.) The CDC 115 is entitled Rules Violation Report, just as the report  
26 issued after the hearing on the CDC 115 is entitled Rules Violation Report. (See Dkt. 1 at 18.)  
To avoid confusion, this court refers to the CDC 115 issued against plaintiff on May 25, 2005, as  
the "CDC 115." (Dkt. 1 at 23.) The court refers to the Rules Violation Report, issued following  
the hearing on June 20, 2005, as the "RVR." (Dkt. 1 at 18.)

1           16. Defendant Herrera was not involved in plaintiff's continued retention in ad  
2 seg after June 20, 2005. (Herrera Decl. ¶ 19.)

3           17. Defendant Herrera was not involved in plaintiff's Institutional Classification  
4 Committee ("ICC") hearings. (Herrera Decl. ¶ 20; Dkt. No. 97-1 at 3.)

5           18. Defendant Herrera was not involved in, and did not prepare any chronos  
6 regarding plaintiff. (Herrera Decl. ¶ 21; Dkt. No. 97-1 at 3.)

7           19. Defendant Herrera was not involved in, and had no control over, any  
8 decisions made by the ICC regarding plaintiff's transfer. (Herrera Decl. ¶ 22; Dkt. No. 97-1 at  
9 3.)

10           20. Defendant Herrera did not investigate, respond to, or participate in plaintiff's  
11 CDC 602 grievance (appeal log number SOL 05-1528), regarding Hickison. (Herrera Decl. ¶  
12 23.)

13           21. Defendant Herrera did not participate in any investigation regarding  
14 plaintiff's allegations against Hickison because such investigations are handled by CSP-SOL's  
15 Investigative Service Unit ("ISU"). (Herrera Decl. ¶ 24.)

16           22. Herrera signed the CDC 114-D placement notice on June 20, 2005.

17           23. Defendant Fry held the position of Facility Captain at CSP-SOL, and her job  
18 duties included administrative responsibility for a general population facility, supervision of the  
19 custody staff, and maintaining the safety and security of inmates, staff, and the institution. (Fry  
20 Decl. ¶ 2; Dkt. No. 97-1 at 3.)

21           24. Fry's work duties also included reviews of administrative segregation orders,  
22 participating in the ICC, and preparing chronos for inmate files as needed. (Fry Decl. ¶ 3; Dkt.  
23 No. 97-1 at 3.)

24           25. Fry was and is familiar with California Code of Regulations, Title 15,  
25 §§ 3335 (Administrative Segregation), 3336 (Segregation Order), 3337 (Review of Segregation  
26 Order), 3338 (Hearing on Segregated Housing Order) and 3339 (Release from Administrative

1 Segregation and Retention in Administrative Segregation), which provisions establish the  
2 policies and procedures regarding Segregation Housing at all California Prisons. (Fry Decl. ¶ 4;  
3 Dkt. No. 97-1 at 3.)

4           26. On the first work day following an inmate's placement in ad seg, designated  
5 staff at not less than the level of Correctional Captain will review the order portion of the form  
6 CDC 114-D. Cal. Code Regs., tit. 15, § 3337. As Facility Captain, Fry was qualified under  
7 § 3337 to perform this review of the administrative segregation order. (Fry Decl. ¶ 6; Dkt. No.  
8 97-1 at 3.)

9           27. If retention in ad seg is approved at such a review, the following  
10 determinations are also to be made:

11           a. The appropriate assignment of staff assistance, if such assistance is  
12 deemed necessary by the official initiating the form CDC 114-D. If the inmate's caseworker is  
13 not an appropriate assignment because of the caseworker's schedule, an alternate staff assistance  
14 assignment will be made. The inmate will be notified in writing of any change in the assignment  
15 of staff assistance. An inmate may also decline to accept the assignment of his or her caseworker  
16 or the first person assigned. In such cases a different staff member will be assigned to assist the  
17 inmate.

18           b. The inmate's desire to call witnesses or submit other documentary  
19 evidence. If the inmate requests the presence of witnesses or submission of documentary  
20 evidence at a classification hearing on the reason or need for retention in segregated housing, an  
21 investigative employee will be assigned to the case. A request to call witnesses and the names of  
22 witnesses must be submitted in writing by the inmate.

23           c. Whether the inmate has waived the 72-hour preparation period in which  
24 a classification hearing cannot be held, as indicated on the form CDC 114-D, or if the inmate  
25 desires additional time to prepare for a classification hearing. A request and the reason for  
26 needing additional time to prepare for a hearing must be submitted in writing, by the inmate. In



1 the absence of the inmate's waiver of the 72-hour preparation period, or an approved request for  
2 additional preparation time, a classification hearing cannot be held earlier than 72 hours after the  
3 inmate's placement in segregated housing, but will be held as soon thereafter as is practical.

4 d. The most appropriate date and time for a classification hearing based  
5 upon the determination arrived at under (a), (b) and (c) above, and the time limitations prescribed  
6 in § 3338. Cal. Code Regs., tit. 15, § 3337. (Fry Decl. ¶ 7; Dkt. No. 97-1 at 3.)

7 28. Plaintiff's allegations against Hickison were disclosed at his CDC 115  
8 hearing on June 20, 2005. (Fry Decl. ¶ 8; Compl. at 8.)

9 29. The CDC 115 hearing was the first time that Fry learned plaintiff had made  
10 allegations of staff misconduct. (Fry Decl. ¶ 9.)

11 30. Fry had no knowledge that Hickison had submitted a CDC 115 concerning  
12 plaintiff. (Fry Decl. ¶ 10.)

13 31. Fry was not involved in, and did not have control over, the CDC 115 hearing  
14 on June 20, 2005. (Fry Decl. ¶ 11; Dkt. No. 97-1 at 3.)

15 32. Fry reviewed plaintiff's CDC Form 114-D on June 21, 2005, which was one  
16 day after plaintiff's initial placement in ad seg, and was within the time limit established in  
17 § 3337. (Fry Decl. ¶¶ 12, 18, Ex. A.)

18 33. The CDC 114-D explained that plaintiff was being re-housed in ad seg on  
19 June 20, 2005, in order to protect the integrity of an investigation into plaintiff's allegations.  
20 Based on this information, plaintiff was deemed a threat to the safety and security of CSP-SOL.  
21 Plaintiff was to remain in ad seg pending an Administrative Review to ascertain plaintiff's  
22 appropriate program and housing needs. (Fry Decl. ¶ 14; Dkt. No. 97-1 at 3.)

23 34. In addition, under California Code of Regulations, Title 15, § 3272, plaintiff's  
24 custody level was increased to "Maximum," in order to facilitate the move. (Fry Decl. ¶ 15; Dkt.  
25 No. 97-1 at 3.)

26 35. Fry also reviewed the CDC 114-D placement notice and signed it on June 21,

1 2005.

2 36. During Fry's review of plaintiff's CDC 114-D, she interviewed plaintiff to  
3 determine if assignment of staff assistance or an investigative employee was necessary, or if  
4 plaintiff desired one. Plaintiff did not request assignment of staff assistance or an investigative  
5 employee, and Fry determined it was not necessary because plaintiff was literate, fluent in  
6 English and free of any mental incapacity that would affect his ability to understand the  
7 proceedings or to represent himself. (Fry Decl. ¶ 19; Dkt. No. 97-1 at 3.)

8 37. During Fry's review, plaintiff did not request any witnesses for the  
9 classification hearing. Fry determined that under California Code of Regulations, Title 15,  
10 § 3335, plaintiff needed to be retained in ad seg pending ICC review. Further, plaintiff's  
11 retention was necessary because plaintiff's release to the general population would jeopardize the  
12 integrity of the investigation into his allegation of staff misconduct, and to protect the  
13 institution's safety and security. (Fry Decl. ¶¶ 20, 21.)

14 38. Inmate Lancaster was also retained in ad seg, at "Maximum" custody status,  
15 until transferred to an alternate institution. (Dkt. No. 1 at 45.)

16 39. On June 23, 2005, the ICC convened for an initial ASU ("Administrative  
17 Segregation Unit") review. (Fry Decl. ¶ 24. Ex. B; Dkt. No. 97-1 at 3.)

18 40. The policies and procedures regarding inmate discipline, including Rules  
19 Violations, Classification Committees, disciplinary hearings, and hearing procedures which Fry  
20 was required to follow, are contained in California Code of Regulations., Title 15, §§ 3310  
21 through 3326. (Fry Decl. ¶ 25; Dkt. No. 97-1 at 3.)

22 41. Captain Fry was part of the ICC, which also included Correctional Counselor  
23 II Baughman, Acting Chief Deputy Warden Johns, Dr. Fleischman, ASU Sergeant Terrazas, and  
24 Security & Investigation Correctional Officer Ballesteros. (Fry Decl. ¶ 26; Dkt. No. 97-1 at 3.)

25 42. Plaintiff was also present at the ICC hearing on June 23, 2005. (Fry Decl.  
26 ¶ 27; Dkt. No. 97-1 at 3.)

1           43. Plaintiff did not request witnesses for the purpose of the June 23, 2005  
2 review. (Fry Decl. ¶ 29; Dkt. No. 97-1 at 4.)

3           44. At the time of that ICC review hearing, it was noted that, according to  
4 plaintiff's CDC 114-D, he was placed in ad seg on June 20, 2005, as a result of his making  
5 allegations of staff misconduct, and therefore housed in ad seg to protect the integrity of the  
6 ongoing investigation. The case was under investigation by Security and Investigation ("S&I"), a  
7 special team of staff at each institution assigned to investigate such claims. (Fry Decl. ¶ 30; Dkt.  
8 No. 97-1 at 4.)

9           45. Based upon ICC's review of plaintiff's CDC 114-D, his central file,  
10 disciplinaries, and a thorough discussion with plaintiff, the ICC elected to retain plaintiff in ad  
11 seg pending investigation, to continue "Maximum" custody level, and to refer the matter to a  
12 Classification Staff Representative ("CSR"), with a recommendation of 90-day ad seg extension.  
13 (Fry Decl. ¶ 31; Dkt. No. 97-1 at 4.)

14           46. At the conclusion of the ICC hearing on June 23, 2005, plaintiff was informed  
15 of his appeal rights with regard to the committee's action and he acknowledged his  
16 understanding and agreement. (Fry Decl. ¶ 35; Dkt. No. 97-1 at 4.)

17           47. Acting Chief Deputy Warden Johns was the chairperson of the ICC on June  
18 23, 2005. (Fry Decl. ¶ 32; ; Dkt. No. 97-1 at 4.)

19           48. As a matter of course, if the members of the ICC express any disagreement  
20 regarding the committee's findings or recommendations, Mr. Johns, as the Chairperson, had the  
21 authority to make final decisions. (Fry Decl. ¶ 33; Dkt. No. 97-1 at 4.)

22           49. The members of the ICC had no disagreement over their decision to retain  
23 plaintiff in ad seg pending investigation, to continue "Maximum" custody level, or to refer the  
24 matter to a CSR with recommendation of 90-day ad seg extension. (Fry Decl. ¶ 34; Dkt. No. 97-  
25 1 at 4.)

26           50. Correctional Counselor II Baughman, as Recorder, and Johns, as Chairperson,

1 of the ICC hearing, both signed the June 23, 2005 form CDC 128-G. (Fry Decl. ¶ 36; Dkt. No.  
2 97-1 at 4.)

3 51. On or around August 12, 2005, Fry prepared an informational chrono (CDC  
4 128-B) regarding plaintiff, which stated:

5 You [plaintiff] were placed in the Administrative Segregation Unit  
6 on 6/20/05 after you made allegations of staff misconduct by your  
7 work supervisor, Ms. Hickison. Specifically, you claimed that she  
8 had attempted to coerce an over-familiar relationship with you.  
9 The investigation confirmed that your allegations were complete  
10 fabrications, and that you had solicited other inmates to lie about  
11 Ms. Hickison's actions to substantiate your allegations. Your  
12 actions negatively affected an employee's work assignment and the  
13 institution's ability to provide routine services to the inmate  
14 population by that unit. If successful, your false allegations could  
15 have resulted in the employee's termination of employment. A  
16 thorough review of all of the documentation revealed that there  
17 was insufficient information to support a finding of guilt in a  
18 disciplinary hearing, therefore no charges will be filed against you.  
19 However, the information is sufficiently credible to demonstrate  
20 your willingness to significantly jeopardize Ms. Hickison's  
21 welfare. Ms. Hickison has appropriately continued to work in her  
22 assignment in the Level II Clothing Distribution and your release to  
23 the general population at CSP-SOL would necessitate your contact  
24 with her. For this reason, your release to the general population at  
25 CSP-Solano poses a danger to the safety and welfare of an  
26 employee. You were retained in the ASU at maximum custody  
status, until your transfer to an alternate institution.

(Fry Decl. ¶ 37, Ex. C; Dkt. No. 97-1 at 4.)

18 52. In preparing the August 12, 2005 information chrono for plaintiff, Fry relied  
19 on the CDC 114-D, plaintiff's central file, and disciplinaries. (Fry Decl. ¶ 38.)

20 53. Fry also relied on confidential material,<sup>3</sup> as permitted by California Code of  
21 Regulations, Title 15, § 3321. The confidential material was obtained by CSP-SOL's S&I, and  
22 corroborated through investigations. (Fry Decl. ¶ 39.)

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24 <sup>3</sup> Plaintiff disputes this statement, claiming that Fry "failed to provide discovery on this  
25 issue." (Dkt. No. 97-1 at 4.) However, plaintiff failed to identify the specific discovery request  
26 and response that he alleges Fry failed to address. Moreover, plaintiff did not dispute that he was  
provided form CDC 1030 (Confidential Information Disclosure Form), on August 8, 2005. (Fry  
Decl. ¶ 40, Ex. D; Dkt. No. 97-1 at 4.)

1           54. Under California Code of Regulations, Title 15, § 3321, a CDC 1030  
2 (Confidential Information Disclosure Form), prepared by Correctional Officer McGriff, was  
3 provided to plaintiff on August 8, 2005. (Fry Decl. ¶ 40, Ex. D; Dkt. No. 97-1 at 4.)

4           55. The CDCR 1030 stated that plaintiff was identified by a confidential source  
5 as making false allegations of staff misconduct. (Fry Decl. ¶ 41.)

6           56. In accordance with Fry's usual custom and practice, in determining whether  
7 to file a CDC 115 against plaintiff for making false allegations against Ms. Hickison, she  
8 conducted a case conference with her supervisor, Acting Deputy Chief Warden Johns, to obtain  
9 his input. (Fry Decl. ¶ 43; Dkt. No. 97-1 at 4.)

10           57. On Friday, August 12, 2005, Lieutenant Parks completed a CDC 114-D  
11 regarding plaintiff. (Fry Decl. ¶ 44, Ex. E; Dkt. No. 97-1 at 4.)

12           58. The CDC 114-D stated that plaintiff had been initially placed in ad seg on  
13 June 20, 2005, after making allegations of misconduct by his work supervisor, Hickison. The  
14 investigation confirmed that plaintiff's allegations were completely fabricated, but insufficient  
15 information was gathered to support a finding of guilt in a disciplinary hearing. (Fry Decl. ¶ 45;  
16 Dkt. No. 97-1 at 4.)

17           59. The CDC 114-D further noted that Hickison had appropriately continued to  
18 work in her assignment at the Level II Clothing Distribution, and therefore, plaintiff's release to  
19 the general population at CSP-SOL jeopardized her welfare. Based on this finding, plaintiff was  
20 being retained in ad seg and would remain at "Maximum" custody status until his transfer to an  
21 alternate institution. (Fry Decl. ¶ 46; Dkt. No. 97-1 at 4.)

22           60. Fry completed her review of this CDC 114-D by August 15, 2005 (Monday),  
23 which was the next working day. Her review determined that plaintiff needed to be retained by  
24 ICC due to the danger plaintiff posed to staff had he been released to the general population at  
25 CSP-SOL. (Fry Decl. ¶ 47.)

26           61. Plaintiff refused to sign this CDC 114-D. (Fry Decl. ¶ 48; Dkt. No. 97-1 at

1 4.)

2 62. On August 17, 2005, the ICC again convened for program review. (Fry Decl.  
3 ¶ 49, Ex F; Dkt. No. 97-1 at 5.)

4 63. Fry was part of the ICC, which also included Correctional Counselor II  
5 Baughman, Acting Chief Deputy Warden Crawford, Dr. Cleary, ASU Sergeant Terrazas, and  
6 S&I Sergeant Melgoza. (Fry Decl. ¶ 50; Dkt. No. 97-1 at 5.)

7 64. Plaintiff was present at the ICC hearing on August 17, 2005, and he had  
8 received 72-hour notice of this hearing. (Fry Decl. ¶¶ 51, 52; Dkt. No. 97-1 at 5.)

9 65. At the August 17, 2005 hearing, it was noted that, according to plaintiff's  
10 CDC 114-D, he was placed in ad seg on June 20, 2005, as a result of his making allegations of  
11 staff misconduct, and he was therefore housed in ad seg to protect the integrity of the ongoing  
12 investigation. The investigation had been completed at that time. A new CDC 114-D was issued  
13 on August 12, 2005, for ad seg retention pending transfer in order to ensure staff safety. (Fry  
14 Decl. ¶ 53; Dkt. No. 97-1 at 5.)

15 66. Based upon ICC's review of plaintiff's CDC 114-D, central file,  
16 disciplinaries, and a thorough discussion with plaintiff, the ICC elected to retain plaintiff in ad  
17 seg pending a Board of Prison Terms ("BPT") hearing, and subsequent transfer. The ICC also  
18 determined to refer the matter to CSR with recommendation of 90-day ad seg extension. (Fry  
19 Decl. ¶ 54.)

20 67. At the conclusion of the ICC hearing on August 17, 2005, plaintiff was  
21 informed of his appeal rights with regard to the committee's action and he acknowledged his  
22 understanding and agreement. (Fry Decl. ¶ 57; Dkt. No. 97-1 at 5.)

23 68. CCII Baughman, as Recorder, and Acting Chief Deputy Warden Crawford, as  
24 Chairperson, of the ICC hearing, both signed the August 17, 2005 CDC 128-G. (Fry Decl. ¶¶ 55,  
25 58; Dkt. No. 97-1 at 5.)

26 69. None of the ICC members expressed any disagreement regarding the

1 committee's findings or recommendations, and accordingly, Ms. Crawford was not called upon  
2 to exercise her authority to make a final decision. (Fry Decl. ¶ 56; Dkt. No. 97-1 at 5.)

3           70. Fry did not promulgate the California Code of Regulations, including Title  
4 15, which governs Adult Institutions, Programs, and Parole. Sections 3310-3326 (Inmate  
5 Discipline), 3335 (Administrative Segregation), 3336 (Segregation Order), 3337 (Review of  
6 Segregation Order), 3338 (Hearing on Segregated Housing Order), 3339 (Release from  
7 Administrative Segregation and Retention in Administrative Segregation), and 3379 (Inmate  
8 Transfers), are all contained within Title 15, and Fry was and is required to follow these policies  
9 and procedures. (Fry Decl. ¶ 59.)

10           71. Fry did not and does not know Hickison. (Fry Decl. ¶ 60.)

11           72. Fry did not investigate, respond to, or participate in plaintiff's grievance  
12 (appeal log number SOL 05-1528) against Hickison. (Fry Decl. ¶ 61; Dkt. No. 78 at ¶18.)

13           73. Fry did not participate in any investigation regarding plaintiff's allegations  
14 against Hickison. Such investigations are handled by CSP-SOL's Investigative Service Unit.  
15 (Fry Decl. ¶ 62.)

16           74. The ICC's decisions regarding plaintiff at the June 23, 2005, and August 17,  
17 2005 hearings, were made collectively by the entire committee. (Fry Decl. ¶¶ 63, 66; Dkt. No.  
18 97-1 at 5.)

19           75. As one of the members of the ICC, Fry did not have the authority to decide  
20 the committee's recommendations and actions. (Fry Decl. ¶ 64.)

21           76. The chairperson of the ICC has the authority to make a final decision if the  
22 members of the ICC disagree on the recommendations and actions. (Fry Decl. ¶ 65; Dkt. No. 97-  
23 1 at 5.)

24           77. After the ICC hearing on August 17, 2005, Fry's involvement with plaintiff  
25 regarding his placement or retention in ad seg, and classification was concluded. (Fry Decl.  
26 ¶ 67.)

1           78. Under California Code of Regulations, Title 15, § 3379, inmate transfers  
2 require ICC action and endorsement by a Classification Staff Representative (“CSR”). (Fry Decl.  
3 ¶ 68; Dkt. No. 97-1 at 5.)

4           79. Neither Fry’s participation and conduct in the ICC hearings on June 23, 2005,  
5 and August 17, 2005, nor her decisions as part of the ICC regarding plaintiff’s classification and  
6 placement recommendations, were based on retaliation, evil motive or evil intent. (Fry Decl. ¶  
7 71.)

8                   Disputed Facts

9           1. Whether defendant Hickison retaliated against plaintiff by recommending  
10 plaintiff be fired from his job. Plaintiff argues that on May 25, 2002, defendant Hickison fired  
11 him from his job in retaliation for his threat to file a grievance against her for allegedly sexually  
12 harassing him. Plaintiff contends the “not guilty” finding at the CDC 115 hearing supports his  
13 theory of retaliation. Hickison contends plaintiff was fired from his job for disobeying an order  
14 and becoming loud and argumentative rather than for retaliatory reasons.

15           2. Plaintiff argues adherence to § 3335 is discretionary. Defendants contend it is  
16 mandatory.

17           3. Defendants Fry and Herrera contend they first became aware of plaintiff’s  
18 allegations of staff misconduct on June 20, 2005. (Dkt. 93 at 3; Herrera Decl. ¶ 7; Fry Decl. ¶¶ 8,  
19 9.) Plaintiff contends he did not raise any allegations concerning staff misconduct on June 20,  
20 2005. Plaintiff also states in his complaint that hearing officer Nuehring informed Facility  
21 Captain Fry that plaintiff would be pursuing his staff complaint on Hickison. (Compl. at 11:11-  
22 12.)

23           4. Plaintiff also contends that after dinner on June 20, 2005, plaintiff and inmate  
24 Lancaster were called to the custody office where Herrera asked plaintiff if he was going to  
25 pursue his grievance (staff complaint) against Hickison, to which plaintiff answered “yes.” (Pl.’s  
26 October 5, 2009 Decl ¶ 24.) Plaintiff contends Herrera stated, “then by order of Captain Fry, you



1 and inmate Lancaster are being placed in administrative segregation.” (Id.) Plaintiff included  
2 these statements in his statement of undisputed facts in support of his motion for summary  
3 judgment. (Dkt. 98-2 at 14.) Defendants objected to “these purported facts on the grounds that  
4 they are unintelligible, compound, irrelevant, lack foundation, constitute hearsay, and call for  
5 speculation.” (Id.) Defendants conceded that it is undisputed that Herrera processed the  
6 paperwork to place plaintiff in ad seg. (Id.) However, defendant Herrera did not address the  
7 events occurring after dinner on June 20, 2005 in his declaration. (Dkt. No. 93-2 at 2-3.)

8 In plaintiff’s complaint, plaintiff states the following:

9 Thereafter, on the evening of June 20, 2005, Plaintiff and Inmate  
10 Lancaster E-96955 [were] placed into Ad/Seg (hole) by Facility  
Captain N. Fry and Lieutenant J.L. Herrera states in part:

11 “. . . you made allegations of Staff misconduct,  
12 therefore you are being rehoused in Ad/Seg . . .  
Based on this information you are deemed a threat  
13 to the safety and security of this institution. . . ”  
(See Exhibit F.)

14 (Compl. at 11.) Plaintiff’s Exhibit F is a copy of the CDC 114-D Administrative Segregation  
15 Unit Placement Notice signed by Herrera on June 20, 2005, and reviewed and signed by  
16 defendant Fry on June 21, 2005. (Id.)

17 5. Defendant Herrera declares his action in placing plaintiff in ad seg was not  
18 based on retaliation, evil motive or evil intent. (Herrera Decl. ¶ 26.) Plaintiff contends Herrera’s  
19 action was in retaliation for his grievance against Hickison.

20 6. Defendant Fry declares that her action in placing plaintiff in ad seg on June 20,  
21 2005, was required under California Code of Regulations, Title 15 § 3335, and continuing  
22 plaintiff’s placement in ad seg was solely based on California Code of Regulations, Title 15  
23 §§ 3335-37. Plaintiff contends Fry’s actions were done in retaliation for plaintiff’s grievance  
24 against Hickison and based on false information.

25 ///

26 ///

1                    Analysis

2                    Retaliation

3                    Within the prison context, a viable claim of First Amendment  
4                    retaliation entails five basic elements: (1) an assertion that a  
5                    state actor took some adverse action against an inmate (2) because  
6                    of (3) that prisoner’s protected conduct, and that such action  
7                    (4) chilled the inmate’s exercise of his First Amendment rights,  
8                    [footnote 5 omitted] and (5) the action did not reasonably advance a  
9                    legitimate correctional goal.

10                  Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). An allegation of “harm that is more  
11                  than minimal” from the alleged retaliation can satisfy the fourth element without an allegation of  
12                  a chilling effect. See Rhodes at 567, 568 n.11.

13                  To establish a First Amendment retaliation claim, a plaintiff must show that the  
14                  type of activity he was engaged in was constitutionally protected, that the protected conduct was  
15                  a substantial or motivating factor for the alleged retaliatory action and that the retaliatory action  
16                  advanced no legitimate penological interest. Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997)  
17                  (retaliatory issuance of false rules violation and subsequent finding of guilt). Retaliatory motive  
18                  may be shown by the timing of the allegedly retaliatory act and inconsistency with previous  
19                  actions, as well as direct evidence. Bruce v. Ylst, 351 F.3d 1283, 1288-89 (9th Cir. 2003)  
20                  (retaliatory validation as a gang member for filing grievances).

21                  A prisoner must at least allege that he suffered harm, since harm that is more than  
22                  minimal will almost always have a chilling effect. Rhodes, 408 F.3d at 567-68 n.11; see Gomez  
23                  v. Vernon, 255 F.3d 1118, 1127-28 (9th Cir. 2001) (prisoner alleged injury by claiming he had to  
24                  quit his law library job in the face of repeated threats by defendants to transfer him because of his  
25                  complaints about the administration of the library). A chilling of a prisoner’s First Amendment  
26                  rights is sufficient. Rhodes, 408 F.3d at 569.

                      Once such a showing is made, the burden shifts to the defendant prison officials to  
show, by a preponderance of the evidence, that the retaliatory action was narrowly tailored to  
serve a legitimate penological purpose. See Schroeder v. McDonald, 55 F.3d 454, 461-62 (9th

1 Cir. 1995) (defendants had qualified immunity for their decision to transfer prisoner to preserve  
2 internal order and discipline and maintain institutional security).

3           Retaliation claims brought by prisoners must be evaluated in light of concerns  
4 over “excessive judicial involvement in day-to-day prison management, which ‘often squander[s]  
5 judicial resources with little offsetting benefit to anyone.’” Pratt v. Rowland, 65 F.3d 802, 807  
6 (9th Cir. 1995) (internal citation omitted).

7           In the instant case, plaintiff claims that defendants Fry and Herrera retaliated  
8 against him for filing a grievance against defendant Hickison. Therefore, he has met the first  
9 prong of a retaliation claim. Plaintiff must also show that his protected conduct (filing of a  
10 grievance) was a substantial or motivating factor behind the alleged retaliatory conduct (removal  
11 from work assignment, placement in ad seg, continued placement in ad seg, and placing chrono  
12 in central file). See Mt. Healthy City Bd. Of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977). The  
13 fact that plaintiff was placed in ad seg following a finding of not guilty at the CDC 115 hearing,<sup>4</sup>

14 \_\_\_\_\_  
15           <sup>4</sup> In his declaration submitted with his motion for summary judgment, which plaintiff  
16 incorporated herein by reference, plaintiff contends that both Fry and Herrera concede the CDC  
17 115 report is false because they each responded to a request for admission by stating, “the  
18 document speaks for itself.” (Dkt No. 78 at 11.) However, Request for Admissions No. 29  
19 states:

18           Admit that finding plaintiff “Not Guilty” at the CDC 115 hearing  
19 on June 20, 2005 . . . determined that defendant Hickison’s  
20 allegations against plaintiff were untrue.

21 (Dkt. No. 81 at 68 [Pl.’s 548].) After objections, defendant Herrera’s response was:

22           Defendant is without sufficient knowledge or readily obtainable  
23 information to either admit or deny this request, because he was  
24 not present at, or personally involved in, the Rules Violation  
25 Report hearing. Defendant refers plaintiff to the report for the  
26 Rules Violation hearing that he attached to the Complaint and  
discovery requests, as the document speaks for itself.

(Id.)

25           The request posed to defendant Fry was verbatim of the request to Herrera. (Dkt.  
26 No. 81 at 144 [Pl.’s 622-23].) After objections, defendant Fry’s response was verbatim to  
Herrera’s. (Dkt. No. 81 at 145 [Pl.’s 623].) Therefore, these responses are not concessions that  
either defendant agrees with plaintiff that the CDC 115 report is false.

1 and where no CDC 115 for fabricating allegations against Hickison was filed, raises an inference  
2 that his placement in ad seg was retaliatory.

3 Defendants have produced evidence demonstrating that plaintiff's initial  
4 placement in ad seg was based on California Code of Regulations, Title 15, § 3335, which  
5 provides the guidelines for placing an inmate in ad seg. (Herrera Decl. ¶ 3.) Specifically,  
6 § 3335(a) provides that

7 When an inmate's presence in an institution's general inmate  
8 population presents an immediate threat to the safety of the inmate  
9 or others, endangers institution security or jeopardizes the integrity  
10 of an investigation of an alleged serious misconduct or criminal  
11 activity, the inmate shall be immediately removed from general  
12 population and placed in administrative segregation.

13 Cal. Code Regs., tit. 15, § 3335(a). Defendant Fry also determined that under California Code of  
14 Regulations, Title 15, § 3335, plaintiff needed to be retained in ad seg pending ICC review. Fry  
15 also found plaintiff's retention was necessary because plaintiff's release to the general population  
16 would jeopardize the integrity of the investigation into his allegation of staff misconduct, and to  
17 protect the institution's safety and security. (Fry Decl. ¶¶ 20, 21.)

18 "Maintaining the integrity of an investigation into serious institutional misconduct  
19 is a legitimate penological interest." Bryant v. Cortez, 536 F.Supp.2d 1160, 1169 (C.D. Cal.  
20 2008); see also Draper v. Harris, 245 Fed. Appx. 699 (9th Cir. 2007). The Ninth Circuit has  
21 found that "preserving institutional order, discipline, and security are legitimate penological  
22 goals." Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994).

23 Because defendants have presented affirmative evidence negating an essential  
24 element of plaintiff's claim, plaintiff as the nonmoving party "must do more than simply deny the  
25 veracity of everything offered." Matsushita, 475 U.S. at 586. Thus, plaintiff's denial that  
26 defendants acted in retaliation rather than in compliance with § 3335 is insufficient. To avoid  
summary judgment, plaintiff must "set forth specific facts showing that there is a genuine issue  
for trial." Fed. R. Civ. P. 56(e). Mere conclusory allegations without more are insufficient to

1 support a § 1983 claim or withstand summary judgment. See Ivey v. Board of Regents, 673 F.2d  
2 266, 268 (9th Cir. 1984). The prisoner must submit evidence, either direct or circumstantial, to  
3 establish a link between the exercise of constitutional rights and the allegedly retaliatory action.  
4 Pratt, 65 F.3d at 806. Timing of the events surrounding the alleged retaliation may constitute  
5 circumstantial evidence of retaliatory intent. See Pratt, 65 F.3d at 808.

6 Accordingly, the burden now shifts to plaintiff to demonstrate defendants acted in  
7 retaliation rather than in compliance with § 3335.

8 First, the court will address plaintiff's contention that he made no allegations of  
9 misconduct against Hickison on June 20, 2005. In his complaint, plaintiff states the following:

10 On June 20, 2005, plaintiff was called into custody at CSP-Solano  
11 for a CDC 115 write-up, that he received from D. Hickison. . . .  
12 Plaintiff informed the hearing officer (J.A. Nuehring), the only  
13 reason plaintiff [was] receiving a CDC 115 write-up is he informed  
14 J. Rhoden that he is going to file a 602/Staff Complaint on D.  
15 Hickison. The Hearing Officer proceeded in looking into the  
16 602/Staff Complaint at plaintiff's CDC 115 Hearing. The Hearing  
17 Officer proceeded to call plaintiff's witnesses into the hearing.

18 (Compl. at 8.) The report from the June 20, 2005 CDC 115 hearing, (dkt. no. 1 at 18-21),  
19 confirms plaintiff was claiming staff misconduct in the form of retaliation and sexual harassment  
20 by Hickison:

21 Requested Witness Testimony: SHO noted the following  
22 questions posed to the requested witnesses by [plaintiff] leave  
23 ample questions as the role [plaintiff] played during this incident.

24 Interviewed J. Rhoden, Clothing Distribution Supervisor asked him  
25 the following questions:

26 . . .

Q-4 Did [plaintiff] complain about Sexual and [Lewd]  
comments from D. Hickison [on] different occasions?

A-4 I made jokes with him about his Colonoscopy and Diane Hickison picked  
up on it.

Q-5 Because of these reports to you do you think it could be retaliation by  
firing [plaintiff] from laundry Distributions?

1 A-5 No.

2 ...

3 Interviewed Inmate Lancaster E-96955, 13-B1L, asked him the  
4 following questions:

5 ...

6 Q-4 Did [plaintiff] give any reason to be targeted that morning for him to be  
7 remove?

8 A-4 Yea, he went to our supervisor, Jeff and said she was sex playing him  
9 (plaintiff)

10 SHO posed this question: Q-1 Has your supervisor sexually  
11 harassed you (Lancaster) in any way?

12 A-1 Yes, she has rubbed the back of my arm and  
13 asked me how I was.

14 (Dkt. No. 1, at 18-20.) Thus, although the rules violation report (“RVR”) does not expressly  
15 state that plaintiff informed the hearing officer about the CDC 602 grievance against Hickison,  
16 plaintiff confirms he informed the hearing officer about the CDC 602 grievance and the hearing  
17 officer looked into the CDC 602 grievance during the hearing. (Compl. at 8.) All of the above  
18 confirms plaintiff raised allegations of misconduct by Hickison at the June 20, 2005 hearing.<sup>5</sup>

19 Second, plaintiff has adduced no evidence to contravene the legitimate  
20 penological interest defendants had in confining plaintiff in ad seg pending investigation into  
21 plaintiff’s claims of staff misconduct. The documentary evidence states plaintiff was placed in  
22 ad seg pending the investigation. Moreover, plaintiff’s statement in his declaration concerning  
23 Herrera’s statements after dinner on June 20, 2005, supports defendants’ position:

24 Herrera asked plaintiff is he was going to pursue his grievance  
25 (staff complaint) against Hickison to which he stated yes. In  
26 response, Herrera stated, “then by order of Captain Fry, you and

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<sup>5</sup> This does not mean that plaintiff raised new allegations of misconduct by Hickison at the June 20, 2005 hearing. It simply means plaintiff informed the hearing officer about the allegations raised in his May 31, 2005 grievance against Hickison, and also raised allegations of staff misconduct by his questions posed to witnesses at the June 20, 2005 hearing.

1 inmate Lancaster are being placed in administrative segregation.”  
2 (Dkt. No. 78 at 12 ¶ 24.) If plaintiff had decided not to pursue his allegations of staff  
3 misconduct, there would be no need for an investigation, and thus, there would be no need to  
4 place plaintiff into ad seg pending that investigation.

5 However, because plaintiff was pressing claims of sexual misconduct against a  
6 prison employee, defendant Hickison, it was reasonable for defendants to place plaintiff into ad  
7 seg to protect plaintiff, if Hickison was harassing plaintiff, or, if plaintiff’s allegations against  
8 Hickison were false, to protect her from further contact with plaintiff. Given the nature of the  
9 charges, it was appropriate for defendants to place plaintiff into ad seg pending investigation into  
10 those charges. Plaintiff’s placement in ad seg was not punitive, but was to protect the  
11 investigation into serious charges of staff misconduct. There is no evidence here that defendants  
12 used ad seg “as a pretext for indefinite confinement.” See Hewitt v. Helms, 459 U.S. 460, 477  
13 n.9 (1983). Indeed, an investigation was performed, and it is undisputed that a subsequent ICC  
14 hearing was held where the decision to place and retain plaintiff in ad seg was ratified and  
15 confirmed. (UDF 52-53, 57.)

16 Plaintiff must provide more than a scintilla of evidence that his confinement in ad  
17 seg did not advance any legitimate penological goals. Conclusory allegations will not suffice to  
18 survive summary judgment. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Thus,  
19 defendants are entitled to summary judgment on this claim.

20 Plaintiff’s claim that his placement into ad seg on June 20, 2005, was retaliatory  
21 because he was not placed in ad seg on June 2, 2005, when prison officials first received his  
22 CDC 602 grievance against Hickison, also fails. Plaintiff has adduced no evidence  
23 demonstrating that either Fry or Herrera had notice of the initial 602 grievance. Both Fry and  
24 Herrera have provided declarations stating they first became aware of plaintiff’s allegations of  
25  
26

1 staff misconduct on June 20, 2005, the date of the CDC 115 hearing.<sup>6</sup>

2 Plaintiff argues that because defendants are “custody,” they were responsible to  
3 know about Hickison’s rules violation report against plaintiff, and plaintiff’s grievance via the  
4 CDC 602. (Dkt. No. 97-1 at 2.) In his declaration, plaintiff contends Fry and Herrera can be  
5 charged with notice and knowledge of the grievance because they based his ad seg placement on  
6 the events of the CDC 115 hearing. (Dkt. No. 78 at 14.) Plaintiff argues defendants “cannot  
7 evade the causal nexus between their decision based on the hearing, which was based on the  
8 report, which noticed the grievance.” (Id. at 15.) Plaintiff does state in his complaint that the  
9 hearing officer advised Fry about the grievance. Arguably, the substance of plaintiff’s allegations  
10 from the May 31, 2005 grievance were raised during the CDC 115 hearing. But none of  
11 plaintiff’s arguments connect these defendants with the initial grievance, in light of their  
12 declarations that they were unaware of plaintiff’s allegations prior to June 20, 2005, or to the  
13 failure of other prison employees to place plaintiff in ad seg immediately upon receipt of his  
14 grievance against Hickison.

15 Plaintiff appears to argue that because “custody” received plaintiff’s grievance,  
16 defendants should have known about plaintiff’s staff misconduct complaint prior to June 20,  
17 2005. Inferences are not drawn out of the air, and plaintiff must produce a factual predicate from  
18 which the inference may be drawn. See Richards, 602 F. Supp. at 1244-45. Plaintiff has failed  
19 to show either Fry or Herrera received a copy of the CDC 602 grievance or accessed it some  
20 other way. Review of the CDC 602 grievance and subsequent appeals reveals no involvement by  
21 Fry or Herrera. (Dkt. No. 1 at 27-30; 33-37; see also Dkt. No. 78 at 9.) It is undisputed that  
22 neither defendant participated in any investigation regarding plaintiff’s CDC 602 grievance  
23

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24 <sup>6</sup> Plaintiff is correct that neither defendant expressly states how they became aware of the  
25 allegations of staff misconduct. But in light of their declarations that they were unaware of  
26 plaintiff’s allegations prior to June 20, 2005, and plaintiff’s failure to demonstrate they did know  
about the allegations prior to June 20, 2005, how each became aware of plaintiff’s allegations is  
not relevant here.



1 against Hickison because such investigations are handled by CSP-SOL's Investigative Service  
2 Unit. (Herrera Decl. ¶ 24.)

3 Plaintiff has failed to provide a regulation that demonstrates Fry and Herrera, in  
4 their professional capacity, were required to "be aware" of all grievances alleging staff  
5 misconduct. But even assuming, arguendo, these defendants "should have known," such an  
6 allegation is insufficient to demonstrate that they retaliated against plaintiff, particularly where  
7 plaintiff has failed to demonstrate they were actually aware of the May 31, 2005 grievance.

8 Because plaintiff has failed to demonstrate Fry or Herrera knew plaintiff filed a  
9 CDC 602 grievance against Hickison prior to June 20, 2005, plaintiff cannot show a causal  
10 connection between his filing of the CDC 602 grievance and the failure of other prison staff to  
11 put plaintiff in ad seg upon receipt of the grievance against Hickison. See Pratt, 65 F.3d at 807.  
12 Thus, defendants are entitled to summary judgment on this claim.

13 Plaintiff argues prison officials have discretion whether to abide by § 3335.  
14 However, the actual language of § 3335(a) is mandatory: "the inmate shall be immediately  
15 removed." Id. (emphasis added). Even assuming, arguendo, defendants had discretion, plaintiff  
16 has submitted no evidence demonstrating the mere act of following § 3335 demonstrates  
17 retaliation by defendants under these circumstances. Maintaining an investigation's integrity is a  
18 legitimate penological interest. Collier v. Brown, 635 F.Supp.2d 1144, 1161 (C.D. Cal. 2009).  
19 Plaintiff has also failed to provide evidence that defendants' adherence to § 3335 on June 20,  
20 2005, or June 21, 2005, did not reasonably advance a legitimate correctional goal.

21 August 12, 2005 Chrono

22 The court turns now to plaintiff's claim that Fry retaliated against plaintiff by  
23 placing a negative chrono into plaintiff's central file on August 12, 2005, even though no charges  
24 were filed against plaintiff. (Compl. at 12.) Plaintiff was retained in ad seg after it was  
25 determined that his allegations against defendant Hickison were false. The August 12, 2005,  
26 chrono apparently remains in his central file.

1 In denying defendant's motion to dismiss on this claim, the court stated:

2 According to the chrono, plaintiff's false allegations against  
3 defendant Hickison were serious enough to warrant his transfer to  
4 another prison yet no disciplinary charges were filed because there  
5 was insufficient information to support a finding of guilt in a  
6 disciplinary hearing. The court is puzzled that plaintiff was not  
7 charged with making false charges against defendant Hickison,  
8 particularly since these "actions negatively affected an employee's  
9 work assignment and the institution's ability to provide routine  
10 services to the inmate population by that unit." In addition, "if  
11 successful, [the] false allegations could have resulted in the  
12 employee's termination of employment." These circumstances as  
13 well as the not guilty finding at the disciplinary hearing discussed  
14 above suggest that plaintiff's placement in ad seg and transfer were  
15 made for reasons other than to advance legitimate correctional  
16 goals. Plaintiff has pled sufficient facts to support his retaliation  
17 claims against defendant Herrera and Fry. . . .

18 (June 2, 2008 Findings and Recommendations at 11.)

19 Defendant Fry declares that in preparing the chrono, she relied on CDC 114-D,  
20 plaintiff's central file, disciplinaries and confidential material, as permitted under California  
21 Code of Regulations, Title 15, § 3321. (Fry Decl. ¶ 38-39.) Fry provides a copy of the CDC  
22 1030, "Confidential Information Disclosure Form," which indicates plaintiff:

23 was identified by a confidential source as making false allegations  
24 of staff misconduct, during the month of July 2005, while housed  
25 in Administrative Segregation in cell 9-231-L.

26 (Ex. D, Fry Decl.) The "Reliability of Source" portion of the form states "Information received  
was corroborated through investigation." (Id.) The form was based on a "confidential memo  
dated August 5, 2005 authored by Correctional Officer McGriff located in the confidential  
section of [plaintiff's] central file." (Id.) McGriff signed and dated the form on August 8, 2005.  
(Id.) Fry declares she decided not to file a CDC 115 against plaintiff for making false allegations  
against Hickison

because based on [her] correctional experience and knowledge, it would be  
difficult to demonstrate beyond a preponderance of the evidence that [plaintiff]  
knowingly falsified allegations against [Hickison], as would have been required to  
substantiate disciplinary charges against [plaintiff], as opposed to [plaintiff's]  
subjective perception of the situation.

1 (Fry Decl. ¶ 42.) Fry confirms she “conducted a case conference with [his] supervisor, Acting  
2 Deputy Chief Warden Johns, to obtain his input” as to whether a CDC 115 should be filed. (Id.,  
3 ¶ 43.)

4 Plaintiff utterly fails to address this issue in his opposition to the motion. (Dkt.  
5 No. 97, *passim*.) In his declaration, plaintiff contends that Fry’s failure to issue a CDC 115 or to  
6 refer the matter for criminal prosecution is “evidence that plaintiff’s grievance was true.” (Dkt.  
7 78 at ¶ 29.) Plaintiff cites as evidence “Exhibit 1, p. 39(d)” to his complaint. However, the  
8 exhibits to plaintiff’s complaint use letters rather than numbers, and plaintiff failed to serially  
9 number the pages of his complaint. Page 39 is a copy of Fry’s August 12, 2005 informational  
10 chrono. Plaintiff also cites as evidence the August 12, 2005 CDC 114-D Administrative  
11 Segregation Unit Placement Order. (Dkt. No. 80 at 147-48.)

12 Additionally, plaintiff attempts to reference discovery in support of his assertion.  
13 However, plaintiff’s citation to Exhibits 21, 28 & 34 are copies of his requests for admissions  
14 directed to Fry. Although plaintiff cites particular page numbers, there are no responses  
15 contained therein; nor does plaintiff identify a particular request.

16 Plaintiff also cites all of Fry’s responses to his request for production of  
17 documents. (Dkt. No. 81-1 at 94-104.) In addition to Fry’s objections, this exhibit includes  
18 copies of the June 20, 2005 RVR, plaintiff’s May 31, 2005 grievance against Hickison, the June  
19 20, 2005 CDC-114-D signed by Herrera and Fry, a pre-ad seg admission medical report dated  
20 June 20, 2005, the CDC 128-G form “Retain ASU Pending Investigation,” dated June 23, 2005,  
21 the CDC 114-D form signed August 12, 2005; and plaintiff’s May 31, 2005 CDC 602 appeal and  
22 subsequent review rulings thereon. (Dkt. No. 81-1 at 104-29.)

23 Finally, plaintiff cites to Fry’s response to request for admission No. 67. (Dkt.  
24 No. 81-1 at 163.)

25 REQUEST: Admit that the document(s) attached hereto as exhibit  
26 9 are true and correct copies of CDC 114D administrative  
segregation notice for [plaintiff] dated August 12, 2005, and said

1 document(s) is entitled to be admitted in evidence herein pursuant  
2 to Rule 803(6) Federal Rules of Evidence.

3 OBJECTION AND RESPONSE: Defendant objects to this request  
4 on the grounds that it is compound. Without waiving said  
5 objections, defendant admits, on information and belief, that  
6 Exhibit 9 appears to be a copy of a CDC 114 form and a chrono  
7 regarding plaintiff's placement in administrative segregation.  
8 Except as expressly admitted, this request is denied.

9 Id.

10 Plaintiff fails, however, to explain how any of the exhibits or discovery responses  
11 he references support his theory that Fry issued the August 12, 2005 chrono in retaliation for  
12 plaintiff's allegations against Hickison. As explained above, plaintiff may not rely solely on  
13 inferences to oppose a motion for summary judgment. Plaintiff must provide specific facts or  
14 evidence that demonstrate, at a minimum, that there is a material fact in dispute requiring a jury  
15 trial. Plaintiff claims that the "standard for finding prisoners guilty of a rules violation is  
16 extremely lax." (Dkt. No. 97-1 at 4.) Plaintiff has provided no evidence to support this  
17 conclusory statement. Thus, plaintiff has failed to rebut Fry's evidence that the chrono was based  
18 on her investigation, her review of the CDC 114-D, plaintiff's central file, disciplinaries and  
19 confidential material.

20 It is undisputed that on August 12, 2005, Lieutenant Parks completed a CDC  
21 114-D regarding plaintiff, it stated that the investigation confirmed plaintiff's allegations were  
22 completely fabricated, but insufficient information was gathered to support a finding of guilt in a  
23 disciplinary hearing. (Fry Decl., ¶¶ 44-45, Ex. E; Dkt. No. 97-1 at 4.) It is also undisputed that  
24 the CDC 114-D also noted Hickison had appropriately continued to work in her assignment at the  
25 Level II Clothing Distribution, and therefore, plaintiff's release to the general population at  
26 CSP-SOL jeopardized her welfare. (Fry Decl. ¶ 46; Dkt. No. 97-1 at 4.) Based on this finding,  
27 plaintiff was being retained in ad seg and would remain at "Maximum" custody status until his  
28 transfer to an alternate institution. (Id.)

29 Plaintiff also states, in conclusory fashion, that in her review of the CDC 114-D,

1 Fry falsely determined plaintiff was a danger. (Dkt. No. 97-1 at 4.) It appears plaintiff bases this  
2 statement on the fact he was not immediately placed in ad seg when prison officials received his  
3 grievance on June 2, 2005. However, as noted above, plaintiff failed to demonstrate defendant  
4 Fry was aware of plaintiff's May 31, 2005 grievance until June 20, 2005. Because plaintiff has  
5 failed to demonstrate Fry was aware of the May 31, 2005 grievance, he cannot fault Fry for  
6 failing to place plaintiff in ad seg on June 2, 2005. Moreover, just because plaintiff, in hindsight,  
7 posed no danger while he was not in ad seg from May 31, 2005 to June 19, 2005, does not mean  
8 plaintiff would not pose a danger to Hickison once prison officials determined his allegations  
9 against Hickison were false.

10 In addition, it is undisputed that the ICC convened for program review on August  
11 17, 2005, with Fry and 5 other prison officials presiding, and plaintiff in attendance. (Fry Decl.  
12 ¶¶ 49-51; Dkt. No. 97-1 at 5.) It is undisputed that the August 12, 2005 CDC 114-D  
13 recommended plaintiff's retention in ad seg pending transfer in order to ensure staff safety. (Fry  
14 Decl. ¶ 53; Dkt. No. 97-1 at 5.) Plaintiff claims that "the ICC's decision was based on false  
15 information." (Dkt. No. 97-1 at 5.) However, plaintiff provides no citation to facts or evidence  
16 he alleges supports this conclusory statement.

17 Finally, it is undisputed that the ICC's decisions at the June 23, 2005 and August  
18 17, 2005 hearings were collectively made, that Fry did not have authority to decide the  
19 committee's recommendations and actions, and that the Chairperson (not Fry) had the authority  
20 to make a final decision if the ICC members disagreed on the recommendations and actions.  
21 (Fry Decl. ¶¶ 63, 65 & 66; Dkt. No. 97-1 at 5.) It appears from the documentary evidence that  
22 the ICC ratified the information gathered from the investigation and came to the same conclusion  
23 contained in the August 12, 2005 chrono.

24 Plaintiff has again failed to provide admissible evidence suggesting Fry's issuance  
25 of the August 12, 2005 informational chrono was retaliatory or based on false information. Thus,  
26 defendant Fry is entitled to summary judgment on this claim as well.

1           The court has also reviewed the record as a whole in an effort to determine  
2 whether the timing of events here provide sufficient circumstantial evidence to raise a dispute of  
3 material fact as to whether the actions of Fry or Herrera were motivated by retaliation. Unlike  
4 Hines, where Hines recounted numerous facts from which an inference of retaliation could be  
5 raised, plaintiff has failed to point to any facts from which an inference could be raised that  
6 demonstrate Fry or Herrera acted in retaliation. See Hines, 108 F.3d at 268. This court finds that  
7 timing, without more, fails to suggest either defendant was motivated by retaliation for the filing  
8 of the CDC 602 grievance. This determination is particularly true in light of the legitimate  
9 penological reason for the placement of plaintiff in ad seg on June 20, 2005.

10           Plaintiff fails to submit evidence upon which a reasonable jury could rely to  
11 conclude that either Herrera or Fry's decisions here were motivated by retaliation and the  
12 speculation plaintiff offers is insufficient to withstand summary judgment. Both defendants Fry  
13 and Herrera are entitled to summary judgment on all of plaintiff's claims.

#### 14 IV. Plaintiff's Motion for Summary Judgment

15           Because the court recommends the motion for summary judgment brought by  
16 defendants Herrera and Fry be granted, the court need not address plaintiff's motion for summary  
17 judgment as to defendants Fry and Herrera. In light of the above recommendations, the court  
18 will recommend that plaintiff's motion as to these two defendants be denied.

19           The court turns now to plaintiff's motion for summary judgment as to defendant  
20 Hickison. The same summary judgment standards as set forth above apply and will not be  
21 repeated here.

22           In his motion, plaintiff argues that Hickison has failed to provide an explanation  
23 for her actions. (Dkt. No. 75 at 3.) Plaintiff claims he complained to J. Rhoden about Hickison's  
24 alleged sexual misconduct from January 2005 to May 2005. Plaintiff argues that Hickison "has  
25 admitted that the documents of the CDC 115 report and the CDC 115 hearing speak for  
26 themselves." (Id.) Plaintiff contends that because he was found not guilty on the CDC 115, that

1 demonstrates the CDC 115 was false.<sup>7</sup>

2 Undisputed Facts

- 3 1. Plaintiff is proceeding without counsel in the instant action.
- 4 2. Plaintiff is indigent and is not a licensed attorney.
- 5 3. Plaintiff is a California state prisoner, currently confined at Folsom State
- 6 Prison.
- 7 4. From about June 2004 to about November 2005, plaintiff was confined at
- 8 Solano Prison.
- 9 5. From about July 2004 to May 24, 2005, plaintiff was employed in the Solano
- 10 Prison yard 3 laundry room.
- 11 6. At all times material to this action, Hickison was employed by CDCR.
- 12 7. At all times material to this action, J. Rhoden was Hickison's supervisor.
- 13 8. On May 25, 2005, Hickison wrote a CDC 115 rules violation report ("CDC
- 14 115") against plaintiff for an alleged incident on May 24, 2005. Hickison claimed plaintiff was
- 15 "disruptive to the work place" and requested that plaintiff be removed from his work assignment.
- 16 9. On May 31, 2005, plaintiff filed a grievance against Hickison.
- 17 10. On June 20, 2005, a hearing was conducted on the CDC 115 authored by
- 18 Hickison. The findings from the June 20, 2005 hearing were as follows:

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21 <sup>7</sup> In his reply, plaintiff states "[d]efendants cannot now complain that their very own  
22 discovery responses are 'vague, lacks foundation, and is conclusory and speculative.'" (Dkt. No.  
23 101 at 2.) Plaintiff refers to Defendants' Response to Plaintiff's "Separate Statement of  
24 Undisputed Facts in Support of Motion for Summary Judgment. . . ." (Dkt. No. 98-2.) However,  
25 it appears plaintiff misunderstands defendants' statement. Defendants included this statement in  
26 the column containing their explanation for why they dispute plaintiff's allegedly undisputed  
statement. For example, plaintiff claimed the following statement is undisputed: "Hickison  
conceded these facts by admitting that, 'the Rules Violation Report [CDC 115 hearing  
transcripts] speaks for itself.'" (Dkt. No. 98-2 at 4-5.) Defendants objected to that statement,  
claiming that statement is "vague, lacks foundation, and is conclusory and speculative." (*Id.*)

Moreover, it does not appear either party has submitted a transcript of the CDC 115 hearing, and the RVR does not suggest the hearing was transcribed.

1 [Plaintiff] was Not Guilty of the specific act of: DISRUPTIVE  
2 BEHAVIOR, based on the lack of preponderance of evidence  
presented and which needed to be relied upon at the hearing.

3 (Dkt. No. 1 at 21.)

4 11. Plaintiff concedes he is not entitled to damages for emotional or mental  
5 distress. (Dkt. No. 97 at 4.)

6 12. Plaintiff was placed in ad seg on June 20, 2005 (Herrera Decl. ¶ 10), and was  
7 retained in ad seg on June 21, 2005, after Fry’s review. (Fry Decl. ¶¶ 20, 21, 46; Ex. A.)  
8 Plaintiff was again retained in ad seg after the ICC hearing on June 23, 2005 at “Maximum”  
9 custody status until his transfer to another institution could be arranged. (Fry Decl. ¶ 37; Exs. B  
10 & E.)

11 13. Plaintiff lost his job in the laundry and was transferred to another institution.

12 Disputed Facts

13 1. Whether on or about January 15, 2005, at the Solano State Prison yard 3  
14 laundry room, Hickison asked plaintiff “if it was hard to go without sex,” and said “she couldn’t  
15 go without sex for very long.”

16 2. Whether plaintiff reported the January 15, 2005 incident to J. Rhoden, clothing  
17 room supervisor.

18 3. Whether J. Rhoden admitted, during the CDC 115 hearing, that plaintiff  
19 reported the January 15, 2005 incident to J. Rhoden.

20 4. Whether inmate Lancaster verified that plaintiff reported the January 15, 2005  
21 incident to J. Rhoden.

22 5. Whether, on or about February 15, 2005, at Solano State Prison yard 3 laundry  
23 room, Hickison told plaintiff, in front of other inmates, that her sexual preference was for black  
24 men.

25 6. Whether the February 15, 2005 incident was reported by plaintiff to J. Rhoden.

26 7. Whether J. Rhoden admitted, during the CDC 115 hearing, that plaintiff



1 reported the February 15, 2005 incident to J. Rhoden.

2 8. Whether inmate Lancaster verified that plaintiff reported the February 15, 2005  
3 incident to J. Rhoden.

4 9. Whether, on or about March 15, 2005, at Solano State Prison yard 3 laundry  
5 room, Hickison asked plaintiff if he had ever “made it” with a heavy set woman, and, if he had,  
6 what he liked about it.

7 10. Whether J. Rhoden admitted, during the CDC 115 hearing, that plaintiff  
8 reported the March 15, 2005 incident to J. Rhoden.

9 11. Whether inmate Lancaster was present when plaintiff reported the March 15,  
10 2005 incident to J. Rhoden.

11 12. Whether J. Rhoden admitted, during the CDC 115 hearing, that plaintiff  
12 reported the March 15, 2005 incident to J. Rhoden.

13 13. Whether inmate Lancaster verified that plaintiff reported the March 15, 2005  
14 incident to J. Rhoden.

15 14. Whether, on or about April 15, 2005, at Solano State Prison yard 3 laundry  
16 room, Hickison came up behind plaintiff and started rubbing his back in a soothing manner.

17 15. Whether the April 15, 2005 incident was reported by plaintiff to J. Rhoden.

18 16. Whether J. Rhoden admitted, during the CDC hearing, that plaintiff reported  
19 the April 15, 2005 incident to J. Rhoden.

20 17. Whether inmate Lancaster verified that plaintiff reported the April 15, 2005  
21 incident to J. Rhoden.

22 18. Whether, on or about May 18, 2005, at Solano State Prison yard 3 laundry  
23 room, Hickison asked plaintiff if he had gotten lube from the MTA for his ass for his upcoming  
24 colonoscopy, then laughed out loud.

25 19. Whether the May 18, 2005 incident was reported by plaintiff to J. Rhoden.

26 20. Whether J. Rhoden admitted, during the CDC hearing, that plaintiff reported

1 the May 18, 2005 incident to J. Rhoden.

2 21. Whether inmate Lancaster verified that plaintiff reported the May 18, 2005  
3 incident to J. Rhoden.

4 22. Whether, on May 18, 2005, J. Rhoden informed Hickison that plaintiff was  
5 going to file a CDC 602 grievance against Hickison.

6 23. Whether Hickison wrote a false CDC 115.

7 24. Whether Hickison wrote the CDC 115 in retaliation.

8 Retaliation Claim Against Defendant Hickison

9 Plaintiff contends that defendant Hickison wrote a false CDC 115 against him and  
10 fired him from his job after he complained of her sexual misconduct to her supervisor, J. Rhoden.  
11 Both Hickison and J. Rhoden have provided declarations to the contrary. Plaintiff argues that  
12 Hickison “concedes the report was false by stating “the Rules Violation Report speaks for itself.”  
13 (Dkt. No. 62 at 11.) However, there is nothing in the CDC 115 that states or suggests Hickison  
14 concedes her report is false. Plaintiff might argue that the CDC 115 demonstrates Hickison was  
15 only planning to send plaintiff home for the day until Rhoden informed her plaintiff was “going  
16 to put paperwork” on her which was false in nature, at which point she decided to fire plaintiff.  
17 (Dkt. No.1 at 23.) However, Hickison has filed a declaration stating she “informed [plaintiff]  
18 that [she] was going to write a CDCR 128 and CDC 115 to have him unassigned from the  
19 clothing room, because of his disruptive behavior, refusal of a direct order, and creating an  
20 unsafe work place.” (Dkt. No. 98-3 at 3.)

21 Thus, there are material disputes of fact precluding entry of summary judgment in  
22 favor of plaintiff. Plaintiff is not entitled to summary judgment on his retaliation claim as to  
23 defendant Hickison.

24 Eighth Amendment

25 The court has previously found that the complaint states a potential Eighth  
26 Amendment claim against defendant Hickison based on her alleged verbal sexual harassment of

1 plaintiff, as well as the allegation that Hickison touched plaintiff's arm and back. (Dkt. No. 27 at  
2 12-13.)

3 Defendants are correct that verbal sexual harassment of a prison inmate, without  
4 more, does not violate the Eighth Amendment. See Austin v. Terhune, 367 F.3d 1167, 1171 (9th  
5 Cir. 2004) (internal citation omitted). It is also established that physical sexual abuse of an  
6 inmate violates the Eighth Amendment. See Austin, 367 F.3d at 1171. In the instant case, it is  
7 disputed whether Hickison touched plaintiff. Hickison contends that there was no touching.  
8 Plaintiff contends there was touching. This disputed fact is material and must be resolved by a  
9 jury.

10 Defendants also contend that all Eighth Amendment claims by inmates arising out  
11 of inappropriate physical contact require a showing of physical injury. Defendants rely on  
12 section 1997e(e) of Title 28 of the United States Code, which provides:

13 No federal civil action may be brought by a prisoner confined in a  
14 jail, prison, or other correctional facility, for mental or emotional  
15 injury suffered while in custody without a prior showing of  
physical injury.

16 28 U.S.C. § 1997e(e). Section 1997e(e) bars compensatory damages for a claimed mental or  
17 emotional injury absent a showing of physical injury. See Oliver v. Keller, 289 F.3d 623, 629  
18 (9th Cir. 2002). The section does not, however, bar claims for nominal and/or punitive damages  
19 arising from alleged violations of an inmate's constitutional rights. Id. at 629; see also Canell v.  
20 Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998).

21 It is undisputed that plaintiff did not suffer more than de minimis physical injury  
22 as a result of the alleged events of which plaintiff complains. Therefore, plaintiff may not  
23 recover compensatory damages for the alleged emotional and/or mental harm that he claims  
24 followed from Hickison's alleged actions. See Oliver, 289 F.3d at 629. It is also clear, however,  
25 that plaintiff has stated a potentially cognizable claim for violation of his Eighth Amendment  
26 rights by alleged sexual harassment. (See Findings and Recommendations filed June 2, 2008;

1 Order filed August 20, 2008.) In his complaint, plaintiff seeks punitive damages for violation of  
2 his Eighth Amendment rights, and his complaint “is consistent with a claim for nominal  
3 damages” for the alleged Eighth Amendment violation. Oliver, 289 F.3d at 630. Section  
4 1997e(e) does not preclude recovery of such damages on plaintiff’s cognizable Eighth  
5 Amendment claim. Therefore, plaintiff’s claim for emotional or mental distress damages should  
6 be dismissed.<sup>8</sup> But plaintiff’s motion for summary judgment should be denied as there are  
7 disputed issues of material fact that must be resolved by a jury.

8 Discovery

9 Finally, in plaintiff’s reply to the opposition to his motion for summary judgment,  
10 plaintiff objects that defendants not be allowed to oppose plaintiff’s motion for summary  
11 judgment because “the defendants now present facts in their undisputed facts and declarations  
12 that were not disclosed during discovery.” (Dkt. No. 101 at 3.) Plaintiff contends this is “[i]n  
13 defiance of the court’s June 12, 2009 order.

14 However, the pertinent portion of the June 12, 2009 order reads as follows:

15 *Requests for Admissions–Hickison*

16 Plaintiff objects to defendant Hickison’s responses to request for  
17 admissions no. 25 which stated, “Admit that prior to May 25, 2005,  
18 Plaintiff Morris was not issued any CDC 128B chrono’s (for poor  
19 work performance) while assigned to the Solano Prison Clothing  
20 distribution.” Defendant objected that the request was vague and  
21 ambiguous. Without waiving objection, defendant Hickison  
22 responded that following a reasonable inquiry, she was without  
23 sufficient knowledge to admit or deny this request because she is  
24 not currently employed by the California Department of  
25 Corrections and Rehabilitation (CDCR) and lacks sufficient  
26 personal knowledge or recollection regarding plaintiff’s chronos or  
CDC 128 forms.

Defendant Hickison’s objection that she does not have sufficient

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24 <sup>8</sup> Although the court is not required to reach this issue herein because it is  
25 recommending that the motion for summary judgment brought by defendants Herrera and Fry be  
26 granted, nevertheless it is appropriate to address this issue now because it was raised in  
defendants’ motion and it would be a waste of judicial resources to require defendant Hickison to  
file a motion on this single issue with the same result.

1 knowledge to admit or deny request for admission no. 25 because  
2 she is no longer employed by CDCR is valid.

3 The court notes, however, that defendant Hickison, and for that  
4 matter all defendants, will not be permitted to vary from their “I  
5 don’t know” responses, i.e., they will not be permitted to “get  
6 smart” just before motion filing or trial. If they do not have  
7 personal knowledge sufficient to answer the requests now, it would  
8 be a total abuse of the discovery process for these defendants to  
9 testify in terms of declarations or at trial to facts for which they  
10 presently disclaim knowledge.

11 (Dkt. No. 63 at 5-6.)

12 Plaintiff submitted 717 pages of exhibits in support of his motion, which included  
13 copies of discovery requests as well as discovery responses. (Dkt. Nos. 91 & 92.) Plaintiff,  
14 however, has failed to pinpoint a particular discovery request to which a defendant responded “I  
15 don’t know,” but then contradicted that response in response to the pending motion. This court  
16 is not required to sift through 717 pages of exhibits to determine whether such discovery  
17 response exists. See Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal citation  
18 omitted) ([I]t is not the court's obligation “to scour the record in search of genuine issues of  
19 triable fact.”). If plaintiff wishes to produce evidence of such contradiction at trial, he must  
20 produce the actual discovery request and response that he alleges violates the June 12, 2009  
21 order. Because the response includes the request, plaintiff does not need to separately provide  
22 his request.

23 Plaintiff also claims that Hickison is now adding information that she failed to  
24 disclose through discovery. (Dkt. 101 at 4 “This is rebutted by her absolute silence up until  
25 now.”) Plaintiff also claims Hickison “suddenly remembers” facts not disclosed through  
26 discovery. (Id. at 4-5.) However, plaintiff has failed to demonstrate that he propounded  
discovery that would elicit the facts he now claims she is first remembering. If plaintiff can  
demonstrate a specific discovery request where Hickison responded “I don’t know,” but should  
have responded with facts she is claiming now, the court can address that contradiction at that  
time. But plaintiff is cautioned that it must be a direct factual contradiction rather than an

1 inference or an argument based on the facts.<sup>9</sup>

2           If plaintiff can produce specific evidence of such factual contradiction, he should  
3 provide it in an appropriate motion in limine. A further scheduling order will issue, if  
4 appropriate, after the district court addresses the instant findings and recommendations. That  
5 order will address the time period for filing motions in limine, and plaintiff should not file such a  
6 motion until the time prescribed by the scheduling order.

7 V. Qualified Immunity

8           Because the court finds defendants Fry and Herrera are entitled to summary  
9 judgment, it need not reach the issue of qualified immunity.

10 VI. Conclusion

11           For all of the above reasons, IT IS HEREBY RECOMMENDED that:

- 12           1. The motion for summary judgment filed by defendants Fry and Herrera be  
13 granted. (Dkt. No. 93.)
- 14           2. Plaintiff's motion for summary judgment be denied. (Dkt. No. 75.)
- 15           3. Plaintiff's claim for emotional or mental distress damages be dismissed.
- 16           4. This action shall proceed solely on plaintiff's retaliation and Eighth  
17 Amendment claims against defendant Hickison.
- 18           5. This case be referred back to the magistrate judge for further orders.


19           These findings and recommendations are submitted to the United States District  
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-  
21 one days after being served with these findings and recommendations, any party may file written  
22 objections with the court and serve a copy on all parties. Such a document should be captioned

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23           <sup>9</sup> For example, plaintiff's statement that Hickison's claim she did not retaliate against  
24 plaintiff is rebutted by her discovery responses that the "documents speak for themselves,"  
25 because the documents "say that she wrote a false rules violation report against plaintiff because  
26 he made grievances to J. Rhoden about her misconduct," is simply not true. The documentary  
evidence contains no such statement. Whether plaintiff wishes to argue that the documentary  
evidence raises an inference that the report is false is completely different.

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
2 objections shall be filed and served within fourteen days after service of the objections. The  
3 parties are advised that failure to file objections within the specified time may waive the right to  
4 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: July 29, 2010

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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